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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1640

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

THE HONORABLE EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

UNITED NUCLEAR CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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TABLE OF CONTENTS

	Page
Opinions and Orders Below	1
Jurisdiction	3
Questions Presented	11
Constitutional and Statutory Provisions Involved	12
Statement	13
Reasons For Not Granting the Writ	20
Conclusion	31

TABLE OF AUTHORITIES

Page

CASES:

Atkinson v. City of Dallas, 353 S.W.2d 275 (Tex. Civ. App. 1961), *cert. denied*, 370 U.S. 939 (1962) 23

Brown v. Allen, 344 U.S. 443 (1953) 9

Brown, et al. v. City of Dallas, et al., No. 9276 (N.D. Tex., filed Sept. 24, 1962) 23

City of Dallas v. Brown, 362 S.W.2d 372 (Tex. Civ. App. 1962) 23

City of Dallas v. Dixon, 365 S.W.2d 919 (Tex. 1963) 23, 24

DeFunis v. Odegaard, 416 U.S. 312 (1974) 5

Dewey v. City of Des Moines, 173 U.S. 193 (1899).. 10

Donovan v. City of Dallas, 377 U.S. 408 (1964) 2, 20, 21, 22, 23 24, 25, 26, 27, 28, 29

Donovan, et al. v. Supreme Court of Texas, et al., No. CA-3-63-120 (N.D. Tex., May 9, 1963) *cert. denied*, 375 U.S. 878 (1963) 24

F. D. Rich Company, Inc. v. United States Industrial Lbr. Company, Inc., 417 U.S. 116 (1974) 9

Irvine v. People of State of California, 347 U.S. 128 (1954) 10

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 10

Michel v. Louisiana, 350 U.S. 91 (1955)..... 9

Michigan Sugar Company v. Dix, 185 U.S. 112 (1902) 10

New York ex rel. Bryant v. Zimmerman, et al., 278 U.S. 63 (1928)..... 10

Wilson, et al. v. Cook, 327 U.S. 474 (1946)..... 10

TABLE OF AUTHORITIES (Continued)

Page

Constitutional Provisions, Statutes and Rules

U.S. Const. Art. III, §2 ..... 4, 5, 11, 12

U.S. Sup. Ct. R. 23(1)(f), 28 U.S.C. 6, 12

Other Authorities

Annot., 32 L.Ed.2d 830, §3[a], [b] (1973) 10

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OPINIONS AND ORDERS BELOW

Petitioner General Atomic Company ("GAC") has filed this Petition as a direct continuation of its Petition in Cause No. 76-385 ("Prior Petition"), in which it sought writs of certiorari directed to (a) the District Court of the First Judicial District, County of Sante Fe, New Mexico, (the "Santa Fe Court"), to review its order of injunction dated April 2, 1976 (the "Injunction"), and (b) the New Mexico

Supreme Court, to review its order entered June 16, 1976, which left the Injunction in effect.[1]

On November 29, 1976, this Court granted GAC's Prior Petition and on December 28, 1976, this Court issued its mandate ordering that the judgment of the Supreme Court of the State of New Mexico be vacated and that the cause be remanded to the Supreme Court of the State of New Mexico to consider whether its judgment was based on federal or state grounds, or both.

Subsequent to the issuance of this Court's mandate to the New Mexico Supreme Court, two opinions of significance to GAC's Petition have been issued. On January 5, 1977, Judge Frankel, presiding in the United States District Court for the Southern District of New York, issued his opinion dismissing Cause No. 76 Civ. 881 which was an action styled *Indiana and Michigan Electric Company v. Gulf Oil Corporation, et al.*, to which GAC was a party (the "I&M suit"). That opinion is annexed to GAC's Petition as Appendix E. On February 21, 1977, in response to the mandate of this Court, the Supreme Court of the State of New Mexico reaffirmed the judgment vacated by this Court, holding that *Donovan v. City of Dallas*, 377 U.S. 408 (1964) was inapplicable to the facts of this case and that the Santa Fe Court had acted within its jurisdiction in granting the Injunction. The Opinion and Order of the New Mexico Supreme Court is annexed to GAC's Petition as Appendix D.

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[1]The Prior Petition contained *only* the following two questions:

> "1. Can a state court in an *in personam* action constitutionally enjoin a defendant, also a defendant in a pending federal court action instituted by a different plaintiff, from impleading or moving to join pursuant to Fed. R. Civ. P. 14 or 19(a) the state court plaintiff as a party in such federal action?
>
> "2. Can a state court in an *in personam* action constitutionally enjoin a defendant from instituting an action in a federal court?" (Prior Petition, pp. 5-6)

Subsequent to this Court's order of November 29, 1976, counsel for respondent United Nuclear ("UNC") and for GAC transmitted letters to the then Chief Justice of the New Mexico Supreme Court. The letter from UNC's counsel, dated November 30, 1976, is reprinted and annexed hereto as Appendix A. The letter from GAC's counsel, dated December 6, 1976, is reprinted and annexed hereto as Appendix B. Also annexed hereto as Appendix C is an excerpt from the transcript of proceedings before the Honorable Edwin L. Felter in the District Court for the First Judicial District, Santa Fe County, New Mexico, on April 2, 1976, relating to the Injunction.

JURISDICTION

This Court Lacks Jurisdiction to Consider the Three Questions Presented in the Petition.

There are no cases or controversies, extant or threatened, within the scope of the first two questions presented in GAC's Petition. Thus, the issues raised by those questions are moot and this Court lacks jurisdiction to entertain them. This Court lacks jurisdiction to consider the issues raised in the third question presented in the Petition since they were not raised in the courts below or in GAC's Prior Petition.

1. *There Are No Cases Contemplated To Be Filed By GAC Against UNC In Federal Court Which Are Precluded By The Injunction.* GAC's first question presented is as follows:

> "Can a state court in an *in personam* action constitutionally enjoin a defendant from instituting an action in a federal court?"

Nowhere in its Petition does GAC claim, or even imply, that it would now institute additional litigation were it not precluded from doing so by the Injunction. Its argument under the first question presented is therefore illusory. GAC is seeking an advisory opinion on only a hypothetical set of facts since it suggests no action that it would take were the relief sought granted. A decision by this Court on issues

raised in GAC's first question will have no effect on the rights of either party in this case.

The first question GAC presents is thus entirely moot. The authorities supporting the argument that this Court lacks jurisdiction to decide this question are presented below in combination with UNC's jurisdictional argument on GAC's second question which, it is submitted, is also moot.

2. *There Is No Longer Any Action Pending In A Federal Court Where GAC Is Precluded By The Injunction From Joining UNC As A Party.* The second question presented by GAC in its Petition is:

> "2. Can a state court in an *in personam* action constitutionally enjoin a defendant from impleading or moving to join the state court plaintiff as a party in the federal court action previously instituted against the defendant by a different party, pursuant to Fed. R. Civ. P. 14 or 19(a)?"

UNC respectfully submits that this question is now moot, and that Article III of the United States Consititution precludes this Court from deciding it.

At the time GAC first petitioned this Court in its Cause No. 76-385 to review the second question presented in the instant Petition, the I&M suit was pending in the United States District Court for the Southern District of New York. After the Santa Fe Court issued its Injunction, GAC urged a dismissal of the I&M suit based upon its contention that UNC was an indispensable party to that action which could not be joined because of the New Mexico Injunction. After initially denying GAC's Motion to Dismiss the action, the court, on January 5, 1977, issued its Opinion granting GAC's Motion. (Opinion of Frankel, J., Appendix E to Petition.)

The I&M case was the only one that has ever fit the description of a case described in the second question in GAC's Petition and formed the cornerstone of GAC's argument in the Prior Petition (Prior Petition, pp. 2, 3, 10, 12

et seq.) Notwithstanding the dismissal of that case prior to the filing of its Petition, GAC has seen fit to continue to request that this Court decide a question which can no longer affect the rights of the litigants in this case. GAC had claimed that the Injunction "prevents petitioner from protecting itself as a defendant in the federal court through exercise of its rights to seek impleader or joinder of UNC***" (Prior Petition, p. 3). No other prejudice was suggested, then or now.

Following Judge Frankel's dismissal of the I&M suit, GAC moved to add I&M as a defendant in the Santa Fe County case. I&M then decided to forego appealing the dismissal of the I&M suit and acceded to GAC's Motion that it be joined in the Santa Fe County case and is presently a party to that action.[2] GAC now blandly points out that it has turned UNC's absence from the I&M case, of which it complained so bitterly, to its advantage. UNC's absence has resulted in GAC's victory. How is victory to be improved upon? By prevailing in the I&M case, GAC has further rendered its second question moot.

It is clear that federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them. This Court has recently reiterated that the inability of the federal judiciary "to review moot cases is derived from the requirements of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). UNC respectfully submits that in view of the developments in the Santa Fe County case and in the related utility litigation summarized above, no controversy exists between the parties with respect to the issues raised in the second question

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[2] GAC's accusations that I&M and UNC have colluded to piecemeal issues between GAC and UNC is ridiculous. (*see* Prior Reply, pp. 8-9; Petition, p. 10; Appendix E to Petition, p. 4). If nothing else, I&M's decision not to appeal Judge Frankel's order dismissing the I&M suit and its decision to accede to GAC's joinder motion in the Santa Fe action indicate its desire to obtain a just and speedy resolution of the issues between it and GAC.

presented by GAC in its Petition and there is no way in which a decision by this Court on that question can affect the rights of the litigants in this case.

3. *GAC Has Not Heretofore Presented Any Claim of Rights Under the Federal Arbitration Act.* UNC respectfully submits that this Court lacks jurisdiction to review the issues in the third question presented by GAC in its Petition which relate to its alleged rights under the Federal Arbitration Act. Those issues were (i) never timely nor properly raised by GAC in the Santa Fe Court, (ii) never raised by GAC before the Supreme Court of New Mexico, and (iii) never raised by GAC in its Prior Petition for Certiorari before this Court in Cause No. 76-385.

Prior to its submission of this Petition, GAC did not, in any manner or at any time, question the power of the trial court to issue the Injunction in question insofar as that power might be limited by the language or spirit of the Federal Arbitration Act. From the time GAC first contested the Santa Fe Court's authority to issue that Injunction in its Response to UNC's Motion for a Preliminary Injunction and in its accompanying memorandum of law (Record: Vol. II, Ex. 12 to Response to Alternate Writ of Prohibition, p.26),[3] until the New Mexico Supreme Court issued its Order and Opinion on February 21, 1977, GAC never once presented to the courts of the State of New Mexico either of the issues raised in Question No. 3 of its Petition; nor has GAC even once cited or made the slightest reference to the Federal Arbitration Act in any pleading, legal memoranda, or oral argument submitted to any court prior to the filing of this Petition.[4] The record in this case in fact affirmatively reveals

[3] References to "Record" are references to the New Mexico Supreme Court record for General Atomic Company v. Edwin L. Felter (No. 10870).

[4] The fact that the Federal Arbitration Act issues raised in Question No. 3 of GAC's Petition have not heretofore been raised or considered in the New Mexico courts is borne out by GAC's failure to comply with the dictates of Rule 23(1)(f) of the Rules of the Supreme Court of the United States which require that a petitioner succinctly specify the stage in the prior proceedings and the manner in which it first raised the federal questions presented so as to give this Court jurisdiction to review them.

that GAC never raised either of the issues presented in Question No. 3 of its Petition either before the trial court or the Supreme Court of New Mexico.

GAC has broken down its third question which deals with the Federal Arbitration Act into two subparts. Subpart (a) is obscure. It poses the question whether a state court in an *in personam* action can constitutionally enjoin a defendant from:

> "(a) seeking to enforce its rights under the Federal Arbitration Act to require the state court plaintiff to arbitrate***" (*see* Petition, p. 4).

The purported issues raised for the first time in Question No. 3 of GAC's Petition confuse the facts in this case. Which federal rights to arbitrate have ever been raised by GAC in this case? Article XVII of the 1973 Uranium Supply Agreement sets forth an arbitration provision. Is GAC now asserting it has a right to resort to a federal court to compel UNC to arbitrate under Article XVII? If so, it is for the first time. No such contention has ever been made. While it is true that amongst the affirmative defenses included in GAC's Answer in the Sante Fe County case, it pleads a right to arbitration, GAC has never taken any steps to exercise that right. In fact, in a proceeding in the Santa Fe Court on April 2, 1976, during which the form of the proposed Injunction was under discussion, counsel for GAC asked that the Injunction be clear in excluding any prohibition against GAC's demanding arbitration in that case. During the discussion before the Santa Fe Court which followed, counsel for UNC made it clear that UNC's application for a preliminary injunction did not contemplate that GAC be enjoined from pursuing arbitration under the arbitration clause of the 1973 Supply Agreement. UNC's counsel expressed his opinion that, in any event, GAC's right to arbitration had been waived (*see* Appendix C hereto).

Actions taken subsequently by GAC's counsel make it clear that GAC's alleged rights under the Federal Arbitration

Act were never addressed to or considered by the New Mexico Supreme Court. GAC has not cited anything in the excerpts it quoted from the June 16, 1976 hearing before the New Mexico Supreme Court (Appendix E to Prior Petition), or anywhere else which reveals even a passing reference to the Federal Arbitration Act. Nor was any such question raised before the New Mexico Supreme Court following the remand by this Court. In fact, the contrary appears. On December 6, 1976, GAC's counsel, Mr. William R. Federici, now a justice of the New Mexico Supreme Court, sent a letter to the then Chief Justice of the New Mexico Supreme Court. GAC therein conclusively laid to rest any contention that the New Mexico Supreme Court had before it, or was asked to decide, any issue concerning the Federal Arbitration Act. That letter states, in pertinent part:

> "***we do respectfully call the Court's attention to the fact that the subject matter of GAC's petition for certiorari was the propriety of Judge Felter's Injunction only in so far as it restrained GAC from initiating proceedings in *federal* courts. In their previous briefs, and argument before this Court, both parties addressed *that* issue only as to whether the District Court had jurisdiction under the supremacy clause and *Donovan*." (emphasis supplied by Justice Federici) (Appendix B hereto, p. 3)

With regard to subpart (b) of the second question presented by GAC, little need be said. That subpart attempts to raise a hitherto unasserted proposition concerning arbitration in relation to claims over against UNC in a pending arbitration. Presumably, GAC is referring here to the Commonwealth Edison and Duke arbitration proceedings. GAC's right to arbitrate with UNC arises out of the 1973 Supply Agreement which is being contested before the Santa Fe Court. GAC has never pursued an arbitration demand against UNC in the Santa Fe Court, and the Injunction never prohibited it from doing so.

GAC's failure to properly raise either of the issues contained in Question No. 3 of its Petition meant that neither

the Santa Fe Court nor the Supreme Court of New Mexico ever had the opportunity to consider or pass upon any claims or questions in this case which related in any way to the Federal Arbitration Act. Indeed, once GAC had failed to properly raise any issue relating to the Federal Arbitration Act before Judge Felter in the Santa Fe Court, it had waived its right to present that issue in its petition for a writ of prohibition submitted to the Supreme Court of New Mexico. It is not surprising, therefore, that the Order and Opinion of the New Mexico Supreme Court did not consider or dispose of any claim by GAC that the Santa Fe Court's Injunction had violated the spirit or language of the Federal Arbitration Act.

GAC's assertion of Federal Arbitration Act rights is doubly inappropriate because review of those issues does not fall within the scope of this Court's mandate in Cause No. 76-385. While GAC begins the instant Petition with the statement that "This petition by General Atomic Company ("GAC") is a direct continuation of Cause #76-385, . . .", it is attempting here to seek this Court's review of Federal Arbitration Act issues which were not raised in its Prior Petition. Even had Petitioner properly presented and preserved issues relating to the Federal Arbitration Act in the state courts of New Mexico, it would have been improper for it to raise such issues in view of the mandate.

UNC submits that GAC's addition of Federal Arbitration Act issues at this stage of the litigation can only be regarded as an attempt to pump new life into a Petition which otherwise retains no vitality.

The principle that an appellate court considers only those questions which were raised and passed upon in the lower courts applies to cases reviewed by this Court, whether the mode of review is by appeal or by certiorari. *Michel v. Louisiana*, 350 U.S. 91 (1955). This Court has repeatedly maintained that it has no jurisdiction to review issues which were not raised at trial, were not raised at the state appellate level, and were not raised in a former petition for certiorari to this Court. *Brown v. Allen*, 344 U.S. 443, 480 (1953); *F. D. Rich Company, Inc. v. United States Industrial Lbr.*

Company, Inc., 417 U.S. 116, 122 n.6 (1974); *see generally* Annot., 32 L.Ed. 2d 830, §3[a], [b] (1973). In *Irvine v. People of State of California*, 347 U.S. 128, 129 (1954), this Court pointed out that it did not approve of "the practice of smuggling additional questions into a case after we grant certiorari."

The fact that one federal question was properly raised does not authorize this Court to search the record for other federal questions which have not been properly raised. *Wilson, et al. v. Cook*, 327 U.S. 474 (1946).[5] The rule requiring that all federal questions be first properly presented in state court applies even where an inspection of the record shows the existence of facts upon which the additional federal question might have been raised, but was not. *Dewey v. City of Des Moines*, 173 U.S. 193 (1899).

This Court has previously ruled that it will consider only the precise federal questions raised in the state courts and parties may enlarge upon their arguments in that regard only if the same arguments were raised in the state courts. *Wilson, et al. v. Cook, supra; McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940). The decisions discussing the particularity required for raising a federal question indicate that this Court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on in the courts below. *New York ex rel. Bryant v. Zimmerman, et al.*, 278 U.S. 63 (1928). Where a claim is allegedly based upon a particular statute, reliance upon that statute must have been clearly shown in the courts below if this Court is to have jurisdiction to review upon certiorari legal questions based directly upon that statute. *See Michigan Sugar Company v. Dix*, 185 U.S. 112 (1902).

Any claim by GAC that issues relating to the Federal Arbitration Act were in any way presented or considered in

[5]This rule applies even if the same provision of the Constitution is the basis for both federal claims.

the courts of New Mexico, thereby entitling it to raise the issues presented in Question No. 3 of the instant Petition, is totally inconsistent with its failure heretofore to make even a passing reference to that federal statute in connection with any of its objections to the Santa Fe Court Injunction.

The decisions of this Court make it clear that GAC's failure to specifically and precisely raise claims asserted under the Federal Arbitration Act in the lower courts is fatal to its Petition insofar as the issues raised by Question No. 3 are concerned. UNC therefore respectfully submits that GAC's submission of any issues and accompanying argument pertaining to the Federal Arbitration Act in the instant Petition is wholly improper and should not be considered by this Court.

QUESTIONS PRESENTED

1. Does Article III of the Constitution preclude this Court from deciding the issues raised in the first two questions presented in the Petition where (i) there are no cases contemplated to be filed by GAC against UNC in federal court which are precluded by the Injunction and (ii) there is no longer any action pending in a federal court where GAC is precluded by the Injunction from joining UNC as a party?

2. Does this Court have jurisdiction to decide questions based upon rights asserted under the Federal Arbitration Act which have not been raised heretofore by the parties or considered by the courts of the State of New Mexico and which were not presented in GAC's Prior Petition?

3. Notwithstanding the mootness of the three questions presented in the Petition, can a state court in an *in personam* action enjoin a defendant from instituting vexatious, harassing, multiplicitous litigation in the federal courts regarding the subject matter and issues of the pending case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The additional constitutional and statutory provisions involved are U. S. Const. Art. III, §2 and U. S. Sup. Ct. Rule 23(1)(f), 28 U.S.C., which provides, in pertinent part:

U.S. Const. Art. III §2:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects."

U. S. Sup. Ct. R. 23 (1)(f), 28 U.S.C.:

> "If review of the judgment of a state court is sought, a statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the Federal questions sought to be reviewed were raised; the method of raising them (e.g. by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

STATEMENT

GAC's Statement is incomplete and misleading. For example, its first sentence reads:

> "The action below is one of several lawsuits arising from five contracts entered into by UNC and four utilities providing for the supply by UNC of uranium and uranium fuel assemblies ('the utility contracts')." (Petition, p. 7)

The quoted statement is 40% incorrect as to the number of utility contracts and 50% wrong as to the number of utilities with whom UNC contracted.[6] It is an oversimplification to depict GAC as succeeding to UNC's rights and obligations.[7]

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[6] UNC entered into two contracts with Commonwealth Edison ("Commonwealth"). On one of them ("Dresden") uranium deliveries are current. The other ("La Salle") is in arbitration in which both GAC and UNC are parties. UNC also contracted with I&M. I&M is a defendant in the Santa Fe County Case, having acceded to GAC's motion to make it a party.

When Gulf United Nuclear Fuels ("GUNF") was formed, mere letters of intent existed between UNC and The Duke Power Company ("Duke") and the Detroit Edison Company ("Detroit"). Duke contracted with GUNF after UNC's departure when UNC was not even a stockholder. Detroit also contracted with GUNF. That contract was superseded by a new agreement between Duke and GAC.

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[7] The sequence of events was that in 1971 UNC had a promising but under-capitalized light water reactor nuclear fuel fabrication enterprise. In that year, it contributed that portion of its business to GUNF, a corporation in which Gulf Oil Corporation ("Gulf") was the majority stockholder. In 1973, Gulf acquired UNC's stock in GUNF. GUNF was then operated for a time as a wholly owned subsidiary of Gulf until it was dissolved and merged into Gulf. Later still, Gulf formed the partnership GAC with Scallop Nuclear, one of the Royal Dutch/Shell Group of companies. Gulf placed into GAC at least most of the GUNF assets and liabilities. UNC asserts in the Santa Fe litigation that the evolution recounted in this footnote was attended, *inter alia*, with fraud, economic coercion, violation of the New Mexico Anti-Monopoly Statutes, and breaches of fiduciary duties on the part of Gulf.

The 1973 Uranium Supply Agreement, its validity and construction, is the focal point of the Santa Fe case. GAC quotes the portion of Article IV which, UNC contends, establishes this phase of the Agreement as a requirements-type contract of GUNFC which, no longer existing, no longer has requirements, and as a result of which UNC has no further obligations. But this portion of the Agreement relates to only 6,460,000 pounds of U_3O_8 .

More significant is Article V which provides:

> "In addition to the Concentrates mentioned in Article IV, UNC shall sell to the Corporation and the Corporation shall purchase from UNC those amounts of U_3O_8 specified in Exhibit "C" hereto. Said U_3O_8 shall be provided in accordance with the terms and conditions, including price, of the applicable UNC Agreements, except that (a) the amounts shall not be subject to adjustment either up or down and (b) whether or not delivery has been deferred or cancelled by the buyer pursuant to the applicable UNC Agreement, the Corporation shall in any event take delivery of such Concentrates in the Year specified in Exhibit 'C' " (Record: Vo. I, Ex. 5 to First Amended Complaint, p. 138 at 144).

Article V purports to relate to 16,167,000 pounds. GAC's repeated implications that this controversy stems from UNC's efforts to obtain windfall profits is a distortion of the grossest sort, and an attempt to divert attention from GAC's objectives.

For example, in the Commonwealth and Duke arbitration proceedings, GAC asserts that it is not obligated to make further deliveries. Similar contentions are being advanced by GAC against I&M and Detroit in the Santa Fe case. Yet,

GAC has and will contend that UNC is nevertheless obligated to deliver to it Article V uranium at the contract price.[8]

If attempts to better one's profit picture are opprobrious, as GAC implies, the onus should be shared equally. The prime difference is that GAC attacks the utility contracts and UNC the 1973 Uranium Supply Agreement.

GAC speaks of UNC having "guaranteed GUNFC's performance of the utility contracts" (Petition, p. 7). This statement is partially accurate, at least insofar as GUNF is concerned. However, GUNF no longer exists. It was dissolved by procedures undertaken by Gulf of which UNC had no knowledge and in which it played no part. There is no guaranty by UNC of GAC's performance of any contract.

The contracts asserted by Duke and Detroit did not even exist at the time of the formation of GUNF or the execution of the guaranty documents. Only letters of intent then existed. Whatever the nature of UNC's contractual obligations which were assigned to GUNF arising from the letters of intent, those letters of intent became *functus officio* upon execution of the contracts by Duke and Detroit with GUNF, as did the guarantees thereof. No guaranty was ever delivered to Detroit in any case. Finally, on the subject of "guarantees" of the utility contracts, UNC would point out that by a document dated September 12, 1973, and executed in connection with UNC's departure from GUNF, Gulf indemnified UNC

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[8] As an example of the monetary effect involved here, Article V deliveries to Commonwealth are estimated in the 1973 Uranium Supply Agreement to amount to 6,356,000 pounds for the La Salle reactors. At a base price of $8.66 per pound, a total of $55,042,960 is involved. If GAC succeeded in avoiding this liability while holding UNC to the Supply Agreement, GAC would be able to garner profits of $211,909,040 on the Commonwealth uranium alone computed at a current spot sale price of $42 per pound. These deliveries are scheduled into 1986. Future prices may rise.

against claims and liability under its supposed guaranty of utility contracts.[9] GAC, in turn, by an Assignment and Assumption Agreement dated April 29, 1974, assumed the liabilities of Gulf under this indemnification of UNC[10] and

[9]Paragraph 6 of the document in question provides:

"On and after the Closing Date, Gulf shall indemnify and hold UNC harmless from and against any and all claims, causes of action, liabilities, obligations, damages, costs and expenses (including reasonable costs and expenses of attorneys and accountants) arising out of, or in any way connected with or relating to (i) any debt, obligation, liability or duty which, at any time on or before the Closing Date, the Corporation shall have assumed or agreed to perform or discharge or (ii) any debt, obligation, liability or duty the performance or discharge of which by the Corporation has been guaranteed by UNC. Any provision hereof to the contrary notwithstanding, Gulf shall not be obligated hereunder to indemnify or hold UNC harmless from anything resulting by reason of any breach by UNC of the agreements described in Exhibit C hereto." (Record: Ex. 6 to First Amended Complaint, Vol. I, pp. 168, 170)

The utility contracts are not enumerated in Exhibit C.

[10]Paragraph 2 of that document provides:

"Assumption of Liabilities. Pursuant to the aforementioned authorization and in consideration of the transfer by Gulf of the assets and property described in Schedule A, the Transferee agrees that from and after January 1, 1974, the Transferee shall be liable for and hereby assumes and agrees to pay, perform and discharge all liabilities of Gulf described in Schedule B, which is hereby made a part of this Assignment and Assumption. (Record: Ex. 32 to Response to Alternative Writ of Prohibition, Vol. III, pp. 655, 658)."

Paragraph V. C. of Schedule B, attached to the Assignment and Assumption Agreement, provides:

"Under Agreement between United Nuclear Corporation, Gulf Oil Corporation and Gulf United Nuclear Fuels Corporation dated September 12, 1973, Gulf agreed to indemnify and hold United Nuclear Corporation harmless from and against any and all claims, causes of action, liabilities, obligations, damages, costs and expenses (including reasonable costs and expenses of attorneys and accountants) arising out of, or in any way connected with or related to the activities of Gulf United Nuclear Fuels Corporation" (Record: Ex. 32 to Response to Alternative Writ of Prohibition, Vol. III, p. 655 at 683).

indemnified Gulf against such liabilities in paragraph 4 thereof.[11]

GAC's Statement continues to infer that there exists some sinister conspiracy among UNC and certain utilities aimed at depriving GAC of its day in court which is supposedly evidenced by the failure of those utilities to pursue their contract claims directly against UNC in litigation and arbitration as GAC would wish (Petition, pp. 10, 13).[12] The fact that GAC is the primary obligor on the utility contracts is a sufficient answer to the query, posed by GAC with an air of puzzlement, as to why the utilities seek performance from it. The utilities have no reason to try to fight their way past the impediments we have recounted to establish liability on the so-called guarantees of UNC. It is doubtful that Duke or Detroit can even establish a contractual relationship with UNC. Whatever the practicalities which may have dictated

[11]Paragraph 4 of that document provides, in pertinent part:

"Indemnification of Gulf. The Transferee agrees to exonerate, indemnify and hold harmless Gulf against all liabilities and obligations arising from any and all actions, suits, proceedings and demands at any time instituted or made against Gulf with respect to the debts, liabilities, contracts, commitments and obligations of Gulf assumed by the Transferee hereunder, and to reimburse Gulf for any expenses (including attorneys' fees) reasonably incurred in connection therewith, all to the extent such debts, liabilities, contracts, commitments and obligations are to be paid or performed after December 31, 1973, ***" (Record: Ex. 32 to Response to Alternative Writ of Prohibition, Vol. III, p. 655 at 658).

[12]This accusation has become a recurring theme in GAC's presentations to various forums in which disputes which are only related to the issues in the Santa Fe case are being heard. GAC has gone so far as to characterize the sharing of the fruits of discovery as a "sweetheart agreement" (*see* Appendix E to Petition, p. 4, n.1).

the litigation choices made by the various utilities,[13] there can be no doubt of a party's right to select whom it will pursue as a defendant.

GAC's Statement maintains that it has demanded arbitration with UNC in the Santa Fe Court and implies that it has been thwarted in this effort by the Injunction (Petition, p. 15). GAC has never prosecuted the demand for arbitration contained in its Answer. The Injunction does not purport to preclude GAC from so doing.[14]

Finally, UNC will respond one last time to those portions of GAC's Statement and Reasons in the Petition setting forth its often repeated claim that the Injunction has prevented it from seeking one forum wherein it will not be exposed to what it feels are "inconsistent results." This claim has, by now, worn thin indeed.

The fact is that GAC has never exhibited any sincere desire to obtain a federal forum in which it would be willing to directly confront UNC with the issues arising under its contracts with UNC. The issues of the Santa Fe case so far as UNC and GAC are concerned include, *inter alia*, construction of the 1973 Uranium Supply Agreement, as well as other

[13]Certain of the utility contracts are not merely for uranium deliveries, but also include uranium fuel fabrication. The I&M and Duke contracts call for this service. UNC had been in fuel fabrication prior to putting that portion of its business into GUNF. It departed from GUNF by a sale of its stock. It emerged from its venture with Gulf shorn of its fuel fabrication capabilities. It thus lacks the ability to perform contracts calling for fabrication.

[14]The arbitration demand contained in GAC's Answer to the Complaint in the Santa Fe case has not been made a part of the Record before this Court. This omission is not surprising since the arguments in the instant Petition relating to GAC's purported arbitration rights as they relate to the Injunction have not been raised heretofore. To the contrary, statements made by counsel for UNC and GAC at a hearing before the Santa Fe Court on April 2, 1976, reveal that counsel understood at that time that GAC's arbitration rights vis-a-vis UNC were not in any way abridged by the Injunction (*see* Appendix C hereto).

documents, commercial impracticability in UNC's performance of it, fraud, economic coercion, violation of fiducial duties and violations of the New Mexico Anti-Monopoly Acts. On January 19, 1976, UNC first sought (unsuccessfully) an injunction against GAC. While counsel were at the Santa Fe Courthouse grappling with this problem, GAC filed the Interpleader case against UNC and four utilities in the New Mexico Federal District Court (Petition, p. 8). That action was dismissed by the District Court because the form of litigation which GAC proposed to establish in the federal court was not truly in the nature of interpleader and was therefore not within the court's jurisdiction under the federal interpleader statute.[15]

By pursuing interpleader, GAC was not seeking to have the "entire controversy" between it and UNC adjudicated. Rather, GAC sought to stand aside from its controversies with UNC while fomenting controversies between UNC and the utilities where none existed. Furthermore, GAC never made any attempt to expand its alleged interpleader action by amendment so as to bring within its scope the controversies being litigated in the Santa Fe Court.

On January 20, 1976, the day after it filed the Interpleader action, Gulf filed its declaratory judgment action against UNC in the same federal court regarding the validity of an alleged release from UNC (*see* UNC's Prior Brief in Opposition to the Prior Petition, "Prior Opposition", p. 10). Being excepted from the Injunction, it could have been restructured by adding parties. Gulf could have added GAC. It could have moved to join the utilities. This was done successfully by GAC as to I&M and Detroit in the Santa Fe case. Gulf could have moved to expand the issues to encompass those pending in Santa Fe.[16] It did not. GAC can

[15]On April 8, 1977, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the United States District Court for the District of New Mexico in that case styled *General Atomic Co. v. Duke Power, et al.*, (the "Interpleader action") dismissing GAC's action in the nature of interpleader.

[16]After the Injunction was issued, Gulf did in fact expand the issues by amendment, though not in any meaningful way. The amended complaint added a count for reformation and another for specific performance.

point to no attempt made by it or its constituent partners to bring the issues presented in the Santa Fe case squarely under one federal roof.

REASONS FOR NOT GRANTING THE WRIT

UNC has argued that this Court lacks jurisdiction to review the three questions presented in GAC's Petition because the issues raised therein are either now moot or were not raised in the courts below. Notwithstanding those jurisdictional arguments, UNC submits that GAC's objections to the Injunction cannot stand on their merits.

Neither Donovan v. City of Dallas Nor the United States Constitution Prohibits the Injunction Issued in this Case. The thrust of the first question presented in GAC's Petition remains based upon GAC's contention that *Donovan v. City of Dallas*, 377 U.S. 408 (1964), deprives a state court of the opportunity to protect its jurisdiction and prevent misuse of the judicial system by enjoining a party from instituting further piecemeal, vexatious, harassing litigation in federal courts where jurisdiction has not yet attached over the parties and the subject matter of their dispute. In its Prior Brief in Opposition to GAC's Prior Petition, UNC submitted to this Court that there was nothing in *Donovan*, its progeny, or the Constitution which prohibits the Injunction issued by the trial court in this case (*see* Prior Opposition, p. 17). The Order and Opinion of the Supreme Court of the State of New Mexico sets forth in detail the factual underpinnings and legal conclusions which supported its decision to quash the alternative writ of prohibition sought by GAC. That Order and Opinion reveals the careful consideration given by the New Mexico Supreme Court to the factual record upon which the trial court based its issuance of the Injunction and to the unambiguous dictates of this Court's decision in *Donovan*. The Order and Opinion of the New Mexico Supreme Court fully supports UNC's contention that *Donovan* has no application to the facts of this case.

In its Order and Opinion, the New Mexico Supreme Court concluded:

> "The thrust of GAC's challenge, however, goes mainly to that portion of the injunction which restrains it from instituting further suits in federal court. GAC relies on Donovan v. City of Dallas, 377 U.S. 408 (1964), for the proposition that a state court is absolutely prohibited from interfering with the right of a party to bring multiple actions designed to harass and oppress its opponent so long as the party resorts to the federal forum. As a matter of state law, we hold that, under these circumstances, a district court has inherent equity powers to order such a restraint. We do not think that Donovan is applicable where a party is currently proceeding in federal court and where any further federal action would be based upon the same issues and events for the purposes of harassment. We do not believe that Donovan removes all equity powers from the jurisdiction of state courts whenever a party resorts to a federal forum". (Appendix D to Petition, p. 7).

The New Mexico Supreme Court's Opinion indicates that that court fully acknowledged and respected the specific holding of this Court in *Donovan* and declined to read into the concise language of that holding the type of broad prohibition against state court injunctions which GAC advances in its Petition. Fully cognizant of the substantial factual distinction between this case and the *Donovan* case, the New Mexico Supreme Court stated:

> "The issue considered in Donovan is not present in the instant case and the rationale for that decision is inapplicable to the facts before the district court. The injunction which was issued does not directly or indirectly affect any proceeding in the district court or appellate courts of the United States where jurisdiction has attached. Those suits which were pending in federal court were exempted from the terms of the injunction. The injunction is directed only towards the institution of

future litigation wherein no federal or state court has yet to acquire jurisdiction.

"GAC contends that this is a distinction without a difference but when the rationale behind the decision is applied to these facts we find that the district court did not run afoul of the dictates of Donovan. The injunction does not offend any interest of comity; the parties are not restrained from proceeding with the suits wherein the foreign court has exercised its jurisdiction. The district court carefully defined the parameters of the injunction to avoid such a conflict" (Appendix D to Petition, pp. 8-9).

The arguments submitted by GAC in support of the proposition that the Injunction in this case violates the dictates of *Donovan* have not changed in any respect as a result of the publication of the Order and Opinion of the Supreme Court of New Mexico. Insofar as the instant Petition attempts to reassert those arguments contained in GAC's Prior Petition, UNC respectfully refers this Court to UNC's Prior Brief in Opposition to that Petition (Prior Opposition, pp. 17-18). It is here intended to merely summarize those arguments already presented by UNC and to respond more specifically to those matters raised by the Order and Opinion of the Supreme Court of New Mexico and the instant Petition by GAC based thereon.

The Supreme Court of New Mexico concluded correctly that in *Donovan*, this Court did not consider the question of whether a state court could enjoin a party from instituting a third federal suit in a federal court where jurisdiction had not attached to protect another party from harassment and oppression.

GAC complains that the New Mexico Supreme Court's restriction of *Donovan* to proceedings where federal jurisdiction has attached prior to the issuance of the state court injunction is inconsistent with the opinion in that case (*see* Appendix D to Petition, pp. 7-9; Petition, pp. 17-18). GAC's argument in this regard is apparently based upon the

fact that some of the original federal court plaintiffs in the *Donovan* case were cited for contempt by the Texas Court of Civil Appeals for having instituted a new federal action after the state court injunction had been issued. However, UNC respectfully submits that if GAC bases its argument squarely upon the opinion of this Court in *Donovan v. City of Dallas*, it is that opinion upon which this Court should focus at this time, rather than the action taken by the Texas appellate court in 1963. In this regard, the chronology of events leading up to this Court's opinion in *Donovan* and this Court's concomitant narrow grant of certiorari in that case are instructive.

The original Love Airport proceeding was fully litigated in *Atkinson v. City of Dallas*, 353 S.W.2d 275 (Tex. Civ. App. 1961). Both the Supreme Court of Texas and the United States Supreme Court thereupon declined to review the decision in that case (*see* 370 U.S. 939 (1962)). On September 24, 1962, Donovan and others filed an action in the Federal District Court for the Northern District of Texas which was styled *Brown et al. v. City of Dallas et al.*, No. 9276, which presented the same issues as were presented in the *Atkinson* case, *supra*. The City of Dallas then petitioned the Texas Court of Civil Appeals for a writ of prohibition restraining Donovan and others from continuing to prosecute that proceeding then pending in the Federal District Court for the Northern District of Texas. That petition was denied. *City of Dallas v. Brown*, 362 S.W. 2d 372 (Tex. Civ. App. 1962). Thereupon, in a petition for mandamus, the City of Dallas asked the Supreme Court of Texas to direct the lower court to issue the writ of prohibition prayed for in *City of Dallas v. Brown, supra. City of Dallas v. Dixon*, 365 S.W. 2d 919 (Tex. 1963). The Supreme Court of Texas then declared that the lower court had the power to enjoin Donovan and others from proceeding in the Federal District Court action then pending and commanded that court to issue the writ of prohibition prayed for by the City of Dallas. It was this judgment by the Texas Supreme Court, along with the subsequent contempt citations whch grew out of that

erroneous judgment, which this Court decided to review in *Donovan v. City of Dallas* (see 377 U.S. at 411). [17]

When the Texas Supreme Court handed down its erroneous judgment in *City of Dallas v. Dixon, supra,* that court was faced solely with the issue of whether or not a state court had the power to enjoin a party from proceeding to prosecute an action where jurisdiction had already attached in a federal court, namely, the action pending in the United States District Court for the Northern District of Texas. Had the Texas Supreme Court in *City of Dallas v. Dixon* correctly ruled that a state court had no such power, Donovan and the other plaintiffs would not have been compelled to institute a new action in federal court, styled *Donovan v. Supreme Court of Texas,* No. CA-3-63-120 (N.D. Tex. *dismissed* May 9, 1963), *cert. denied,* 375 U.S. 878 (1963), which constituted an attempt to enjoin the Texas courts from interfering with their right to proceed in *Brown v. City of Dallas,* a pending action where jurisdiction had already attached.

In *Donovan,* this Court squarely attacked the judgment of the Texas Supreme Court in *City of Dallas v. Dixon, supra,* a judgment which asserted only that a state court had the power to enjoin a party from proceeding in a federal forum where jurisdiction had already attached. This Court then issued the following decision:

> "*** we think the Texas Court of Civil Appeals was right in its first holding that it was without power to enjoin the litigants *from prosecuting their federal court action,* and we therefore reverse the State Supreme Court's judgment upsetting that of the Court of Appeals. We vacate the later contempt judgment of the Court of Civil Appeals, which rested on the mistaken belief that the

[17] This Court's narrow grant of certiorari in *Donovan* was set forth in full in UNC's Prior Opposition (*see* Prior Opposition, p. 20).

> writ prohibiting litigation by the federal plaintiffs was 'valid'." 377 U.S. at 411 (emphasis added).

While it is acknowledged that a number of the plaintiffs involved in the litigation leading up to *Donovan v. City of Dallas* were cited for contempt for instituting new federal actions as well as for having continued to prosecute federal actions where jurisdiction had already attached, this fact should not be used to distort this Court's narrowly circumscribed holding into a broad prohibition which would prevent state courts from preventing the institution of vexatious, harassing and multiplicitous litigation in special cases where a party is intending to abuse its right to seek a federal forum. The language used by this Court throughout its opinion in *Donovan* was clearly restricted to the problems of comity raised where a state court attempts to wrest from a party its right to prosecute a suit in federal court where jurisdiction has attached. This Court's vacation of the contempt judgment of the Texas Court of Civil Appeals was an action which judicial administration required because that judgment was based upon an erroneous decision by the Texas Supreme Court. Once this Court had decided that the Texas Supreme Court had erred in mandating that the Texas Court of Appeals should proceed to issue the injunction requested, it became clear that any contempt citation based upon that erroneous decision, no matter what its scope or language, could not stand.

GAC's request that this Court interpret the *Donovan* opinion, which was so narrowly drawn, by examining the contempt citation of the Texas Court of Civil Appeals rather than the explicit language in the opinion, makes little sense. Such a strained interpretation of the clear language of a written opinion of this Court should not be adopted.

There is little similarity between *Donovan,* where the plaintiffs were merely attempting to relitigate in federal court issues already finally decided, and the instant case, where GAC has attempted to drag UNC into as many federal forums at one time as possible.

Despite the unchallenged finding of fact by the Santa Fe Court that the institution of suits by GAC in addition to those already pending would be contrary to the speedy and orderly administration of justice and would irreparably harm UNC,[18] GAC continues to maintain in its Petition that *Donovan* is controlling in this case. GAC also persists in maintaining that there was no basis for the Santa Fe Court's finding of fact in its preliminary injunction that the institution of additional legal proceedings would have been vexatious, harassing and multiplicitous. Nevertheless, as UNC has already set forth in greater detail in its Prior Opposition Brief, that finding of fact was made by the trial court after it had denied UNC's first application for a temporary restraining order and GAC then chose to undertake a series of actions which convinced the court that GAC was intending to embark upon a strategy of instituting oppressive litigation throughout the country contrary to the speedy and orderly administration of justice (*see* Prior Opposition, pp. 19-22).

The Order and Opinion of the New Mexico Supreme Court in this case fully supports UNC's contention in its Prior Opposition Brief that the Santa Fe Court issued its Injunction in this case based upon an entirely different set of facts and equitable considerations than those present in *Donovan* (*see* Appendix D to Petition, p. 7). Faced with a situation in which its adversary made clear its intention to draw upon the vast resources of its constituent partners in order to pursue a plan of piecemeal litigation throughout the nation so as to circumvent the orderly and speedy resolution of disputes already pending in the state and federal courts of New Mexico, UNC appealed to the trial court for equitable protection. GAC was unable to convince the trial judge that its intended plan of multiplicitous litigation had any purpose other than to harass UNC and the court issued its Injunction based upon appropriate findings of fact which were set forth therein and which have never been properly challenged.

[18] *See* the Santa Fe Court's Preliminary Injunction at Appendix A to the Petition, p. 2.

Any suggestion by GAC that the Supreme Court of New Mexico was ignorant of the facts underpinning the Injunction is preposterous given the extensive briefing submitted by both parties to that court and its comprehensive Order and Opinion entered on February 21, 1977.[19] The record presented to the New Mexico Supreme Court prior to its decision to quash GAC's writ as having been improvidently granted was clear and complete and the subsequent opinion entered by that court was squarely based upon that record (*see* Appendix D to Petition, p.7).

GAC's Petition suggests that the New Mexico Supreme Court was insensitive to its position and was ignorant of the dictates of the *Donovan* decision when it ruled that the trial court's factual findings fully supported its conclusion that "any further federal action would be based on the same issues and events for the purpose of harassment" (Petition, pp. 18-20). However, the Opinion of the New Mexico Supreme Court

[19] GAC casts various aspersions at the New Mexico Supreme Court. For instance, GAC asserts it is "fair to say" that the court "has not yet manifested an understanding" of how GAC's constitutional rights were prejudiced by the injunction. It charitably says that the New Mexico Supreme Court "did not have the benefit of the parties' views concerning either this court's disposition of the Prior Petition or the continuing effect of the Injunction on GAC in proceedings outside New Mexico" (*see* Petition, p. 19). GAC had ample opportunity to present to both the District Court and Supreme Court of New Mexico its version of the facts in its Response to UNC's motion for the preliminary injunction, its Petition and Supplementary Petition to the Supreme Court of the State of New Mexico for a Writ of Prohibition or a Writ of Superintending Control and in the accompanying legal memoranda and briefs submitted to those courts. UNC believes that it would be fair to say that both prior to and after this Court's remand, the New Mexico Supreme Court was fully informed of developments in this case, which GAC claims have operated to its prejudice. This is so because, along with the letter which is Appendix A hereto, that court was provided with the text of this Court's order of November 29, 1976, and five copies of each brief filed by each party in Cause No. 76-385. Additionally, the New Mexico Supreme Court had the benefit of the oral arguments of the parties in the original prohibition proceeding presented on June 16, 1976.

makes it clear that, in reaffirming the Santa Fe Court's right to issue the Injunction, it closely examined GAC's alleged plight in conjunction with the precise dictates of *Donovan*. That Opinion indicates that, at the time that the Supreme Court of New Mexico quashed the alternative writ of prohibition sought by GAC as having been improvidently granted, GAC already had access to three forums (two federal and one state) in which all of its claims could have been presented. Just as the Santa Fe Court remained unpersuaded by GAC's convoluted claims of prejudice in light of the unique factual background presented, so did the New Mexico Supreme Court reject those arguments (Appendix D to Petition, p. 9). GAC's repeated cries of deprivation of a federal right to access to federal forums in light of *Donovan* runs contrary to the facts of this case and distorts the teaching of this Court in *Donovan*.

Faced with a unique set of facts entirely distinguishable from that in the *Donovan* case, the Supreme Court of the State of New Mexico recognized that "The underlying issue before us is whether the District Court may restrict the future acts of a party who is bringing vexatious and oppressive litigation in multiple jurisdictions for the purpose of harassment" (Appendix D to Petition, p. 9). UNC respectfully submits that the New Mexico Supreme Court was correct when it concluded that it did "not believe that *Donovan* removes all equity powers from the jurisdiction of state courts whenever a party resorts to a federal forum" (Appendix D to Petition, p. 7). That was the basis for that court's holding that the Santa Fe Court had acted within its jurisdiction in granting the Injunction and for its decision to quash GAC's writ as having been improvidently granted because this was not a proper case for the invocation of the remedy of prohibition (Appendix D to Petition, p. 10).

UNC submits there is also nothing in *Donovan* or the Constitution which prohibited the trial court from applying its Injunction to GAC's attempt to join UNC as a party to the I&M suit in New York. The Supreme Court of New Mexico

concurred with UNC that the rule announced in *Donovan* applied only to an injunction which purported to enjoin a party from proceeding to prosecute an action in a federal forum where jurisdiction had already attached. When the Santa Fe court issued its Injunction, the United States District Court of the Southern District of New York had neither personal jurisdiction over UNC nor subject matter jurisdiction over the issues disputed directly between UNC and GAC.[20]

A final comment need be made with respect to GAC's argument that the arbitration proceedings now pending between GAC and certain utilities expose GAC to great prejudice as a result of possible inconsistent adjudications which somehow make the Injunction in this case particularly offensive to the holding in *Donovan*. As UNC more fully has set forth in its jurisdictional statement herein, the issues involved in those arbitration proceedings have nothing to do with the Injunction in this case and are distinct from the controversy between UNC and GAC in the Santa Fe Court.

Why, we inquire, would a decision that the 1973 Uranium Supply Agreement is void by reason of Gulf's antitrust activities, be inconsistent with a decision in the Commonwealth arbitration that GAC was not released from the Commonwealth contract by reason of Commonwealth's delays? Obviously, it would not.

Should the Duke arbitration panel hold the GAC-Duke contract in all respects valid and enforceable in accordance with its terms, yet the Santa Fe Court hold the 1973 Uranium Supply Agreement void because procured by fraud and

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[20] GAC's statements in paragraph 1.C. at page 20 of its Petition are partially misleading. UNC would concur that "jurisdiction had already attached *as to GAC* in the action brought by I&M against GAC in New York, before the Injunction was issued" (emphasis added). However, there is no support for GAC's following statement to the effect that there was an "I&M-GAC-UNC contract controversy" in that New York forum, at least in a jurisdictional sense.

coercion, wherein would be the inconsistency? What would be the virtue of trying out the long-standing issues between GAC and UNC concerning the Supply Agreement in the Duke arbitration (and presumably the Commonwealth arbitration as well) when they are already pending and on the eve of trial in Santa Fe? The true danger of inconsistent verdicts would then arise — one answer regarding the Supply Agreement in the arbitration, another in the lawsuit, and Duke not directly concerned with the issue in either.

The Santa Fe Court has given GAC no reason to believe that it will attempt to hold the Commonwealth contract enforceable or unenforceable *as between Commonwealth and GAC* in the former's absence. Even if it proceeded to do something so unusual, how could Commonwealth be bound or benefitted? The spectre of inconsistent verdicts raised by GAC depends on assumptions contrary to sound jurisprudence. UNC submits that the orderly processes of law require the parties to proceed upon the assumption that the Santa Fe Court will make findings of fact in accordance with the evidence, correctly apply the law to them, and fashion appropriate relief.

It is true that the Santa Fe Court denied GAC's motion to dismiss or sever issues relating to Duke and Commonwealth. While the court did not state the reasons for its ruling, UNC supposes that it was because the issues in the Santa Fe case are those between UNC and GAC and are different from those in the arbitrations. In any case, those were prime grounds for denial of that motion advanced by UNC.

The dismissal of the I&M case in the United States District Court for the Southern District of New York does not support GAC's claims of possible prejudice as a result of the Injunction. Judge Frankel's opinion dismissing that case (Appendix E to Petition) reveals that his decision was predicated upon special circumstances, included among which was the fact that a case was pending between UNC and I&M in the Federal District Court in New Mexico involving similar issues to that pending between I&M and GAC in New York. Moreover, GAC had, in the interval, sought to

intervene in the UNC-I&M action and to add I&M as a party in the Santa Fe case. None of these features appertain to either Duke or Commonwealth.

Nothing said in Judge Frankel's second opinion retreats from the statement he made in the first[21] that inconsistent verdicts are an "unlikely prospect", or the description of the issues, quoting with approval from one of the briefs:

> "'The central substantive issue in this case is whether GAC must provide uranium to I&M under the I&M-UNC Contract. The central issue as between GAC and UNC is whether under the agreement between them [to which I&M is not a party, upon which the rights of I&M are in no way dependent, and which has generated an array of issues having no connection with I&M] UNC must provide GAC with the uranium it needs to perform its obligations under the I&M-UNC Contract.'" (Appendix III to Prior Opposition, p. A-5 at 6).

CONCLUSION

As UNC has already more fully set forth (*see* Prior Opposition, pp. 27-28), GAC's continued assertion that it has been denied the right to defend itself vis-a-vis UNC and the issues presented in the Santa Fe Court is without merit. The Santa Fe Court's finding that the institution of any actions by GAC against UNC with regard to claims relating to the subject matter of the Santa Fe lawsuit, would only be "vexatious and harassing" remains unchallenged. There is nothing in the Constitution nor in notions of federal supremacy which prevents a state court from enjoining a party subject to its jurisdiction from abusing the right of access to the courts.

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[21] An earlier Rule 19 Motion by GAC in that case was denied on September 9, 1976 (*see* Appendix E to Petition, p. 1).

Based upon the foregoing, we respectfully submit that the Petition for Certiorari should be denied.

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June 24, 1977

APPENDICES

APPENDIX A

November 30, 1976

Chief Justice LaFel E. Oman
P. O. Box 848
Santa Fe, New Mexico 87501

Re: General Atomic Company v. Hon. Edwin L. Felter, District Judge, New Mexico Supreme Court Cause No. 10870

Dear Chief Justice Oman:

On June 16, 1976 the New Mexico Supreme Court quashed an alternative writ in the above case as having been improvidently issued. Thereafter, a petition for writs of certiorari was filed by General Atomic Company in the United States Supreme Court. (No. 76-385)

On November 29, 1976 the United States Supreme Court granted certiorari, vacated your judgment and said, inter alia:

> "• • • the case is remanded to the Supreme Court of New Mexico to consider whether the judgment is based upon federal or state grounds, or both."

Whether adequate state ground existed to support the New Mexico Supreme Court's order of June 16, 1976 was an issue argued by the parties in the certiorari proceeding. To set forth the presentation of this issue to the United States Supreme Court by the parties and for the convenience of the Court, I transmit herewith five copies of each of the briefs filed by the parties in the certiorari proceedings.

We gather that the question posed by the United States Supreme Court to Your Honors merely requires some sort of statement or certificate responding to the query. See *Whitney v. California*, 274 U.S. 357, 361. *Cf. Department of Mental Hygiene v. Kirchner*, 400 P.2d 321 (Cal. 1965) In any event, I am not sure whether counsel can be of aid to the Court by further briefing or argument, since the answer to the question propounded already exists in the minds of the members of the deciding panel. However, should the Court believe that further action by counsel would be of aid to it, we stand ready to brief and argue any matter which the Court might designate on a short day. We are very much aware of the pending departure of Justice Montoya.

Very truly yours,

/s/ HARRY L. BIGBEE

Harry L. Bigbee

HLB:rm

Enclosures

cc: Montgomery, Federici, Andrews & Hannahs
Rodey, Dickason, Sloan, Akin & Robb
Modrall, Sperling, Roehl, Harris & Sisk

APPENDIX B

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December 6, 1976

The Hon. Chief Justice LaFel E. Oman
Supreme Court of New Mexico
Supreme Court Building
Santa Fe, New Mexico 87501

Re: General Atomic Co. vs. Honorable Edwin L. Felter, District Judge, New Mexico Supreme Court, Case No. 10870

Dear Chief Justice Oman:

We have received a copy of Mr. Bigbee's letter to you dated November 30, 1976. We are writing this letter to state our views as to the proceedings that might appropriately be followed in this Court upon issuance and receipt of the mandate of the United States Supreme Court in the above-captioned case. As pointed out in Mr. Bigbee's letter, the United States Supreme Court's Order, dated November 29,

1976, granted General Atomic Company's ("GAC") petition for certiorari, vacated the judgment and remanded the case to this Court. That Court's mandate is expected to issue later this month.

We disagree with the suggestion in Mr. Bigbee's letter that this Court should act informally and without further proceedings. We also believe it is both necessary and proper to await the mandate of the Supreme Court of the United States.

The United States Supreme Court's Order emphasizes that Court's concern with actions that disturb the comity normally obtaining between the state and federal judicial systems.* We believe that the United States Supreme Court's Order also evidences that Court's desire to have the benefit of the views of this Court in a full and considered opinion discussing the basis for and the merits of the Injunction, not merely some sort of informal statement or certificate.**

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*The United States Supreme Court has also granted certiorari in *Vendo Co. vs. Lektro-Vend Corp.*, 1976-1 Trade Cases, CCH ¶60919, ___ F.2d __ (7th Cir. 1976); cert. granted, _____ U.S. _____ (1976), 45 L.W. 3249 (Docket No. 76-156).

**The importance of careful consideration and a full opinion in response to the United States Supreme Court's remand is apparent from the cases cited in Mr. Bigbee's letter. In *Whitney v. California*, 274 U.S. 357, the California Supreme Court followed an informal procedure to show that a federal question had been considered. Although the United States Supreme Court gave effect to that informal order, it disapproved the procedure followed, stating:

> "The unusual course here taken to show that Federal questions were raised and decided below is *not* to be commended." 274 U.S. at 361 (emphasis added)

A more circumspect procedure was followed in *Department of Mental Hygiene v. Kirchner*, 400 P.2d 321 (Cal. 1965). There additional proceedings were held on remand, involving additional counsel, and the court rendered a full opinion.

The importance of the Supreme Court's mandate must be emphasized. As a technical matter this Court may lack jurisdiction until the mandate has issued. More important, the mandate of the United States Supreme Court may articulate more fully the further action which that Court desires this Court to take and thus assist this Court and the parties in determining what further proceedings are required on remand. After examining and analyzing the mandate, we believe the parties should be entitled to assist the Court by briefing whatever issues may be posed in the mandate.

Although we believe it would be premature to fully explore the matter, we do respectfully call the Court's attention to the fact that the subject matter of GAC's petition for certiorari was the propriety of Judge Felter's Injunction only in so far as it restrained GAC from initiating proceedings in *federal* courts. In their previous briefs and argument before this Court, both parties addressed *that* issue only as to whether the District Court had jurisdiction under the supremacy clause and *Donovan*. For this reason, we believe it clear that this Court necessarily based its judgment on the federal law grounds. In any case, neither party has briefed in this Court in whole or in part any matter of state law concerning the Injunction's restraint of federal proceedings. In light of the lack of briefing on this point and the United States Supreme Court's Order, we believe that if counsel for UNC now wishes to raise any matter of state law, due process entitles GAC to be afforded the opportunity for briefing the matter.

We join with Mr. Bigbee in desiring consideration by this Court as expeditiously as possible. After all, it is GAC, not Mr. Bigbee's client, that is aggrieved by the Injunction. We also recognize that it would be desirable (although not strictly necessary in a legal sense) if Mr. Justice Montoya, who was on the original panel, could participate in the

remand proceedings.*** However, the parties' desire for expedition should not be so pressed as to deprive this Court of the benefit of briefing, careful consideration and a full opinion by this Court. As noted, the matter involves the sensitive problem of comity between state and federal judicial systems and should be given the time and consideration it deserves.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB

By /s/ JOHN ROBB
John Robb

MONTGOMERY, FEDERICI, ANDREWS & HANNAHS

By /s/ WILLIAM R. FEDERICI
William R. Federici

cc: Mr. Harry L. Bigbee

***In both *California v. Krivda*, 409 U.S. 33 (1972), cited by the U.S. Supreme Court in this matter, and in *Department of Mental Hygiene v. Kirchner, supra*, there was a change in the personnel of the California Supreme Court between the time of the original decision and the decision after remand by the U.S. Supreme Court.

APPENDIX C

Excerpts from Transcript of Proceedings on April 2, 1976 in Santa Fe, New Mexico Before the District Court of the State of New Mexico, County of Santa Fe Judge Edwin L. Felter.

Mr. Thompson: The next point — at this point, we would like to ask for clarification. I have also raised the question of the possibility of the Defendants desiring to exercise their rights to arbitration in this case, under Article 17 of the Contract, which is in issue in this case.

The Court: Subject to the supervision of this court.

Mr. Thompson: That is correct. We would ask that the Injunction be clear in excluding any prohibition against us demanding arbitration in this case.

Mr. Bigbee: It is clear enough anyway, anything they want to file in this action will be subject to your Honor's decision.

The Court: Did you, Mr. Bigbee, in your application for a Preliminary Injunction contemplate that the Defendants be enjoined from arbitrating under the Arbitration Clause of the Contract in this form [sic] (forum) subject to the jurisdiction of this court?

Mr. Bigbee: I did not. I understood that it may or may not come up. I have asked repeatedly if they want arbitration, they have never answered me; I think they waived it. That is not the point that I wanted an Injunction on. Anything they want to submit under their responsive pleadings, under the rules, they are entitled to do it.